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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 735

C. C. ROMINE, as Administrator of the Estate of GEORGE A. ROMINE, Deceased,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona and Brief in Support Thereof

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Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner named in the caption above, being the appellee in the court below, respectfully prays for a writ of certiorari to the Supreme Court of the State of Arizona to review the decision and judgment of that court rendered on the *22nd* day of *December,* 1952, which reversed outright the judgment and decision of the Superior Court of Pima County, Arizona for petitioner, being appellee below, against the Southern Pacific Company, a corporation, being appellant below, which case was numbered 34550 in the

Superior Court of Pima County, Arizona, and was an action for the injury and death of George A. Romine, an employee of the Southern Pacific Company, under the Liability Act of the State of Arizona as contained in Sections 56-801 to 56-807 inclusive of the Arizona Code Annotated 1939. Said writ is also to review the order of the Supreme Court of the State of Arizona entered the 26th day of January, 1953, denying this petitioner's motion for a rehearing, which case was numbered 5569 in the Supreme Court of the State of Arizona.

OPINION OF THE APPELLATE COURT

The opinion of the Supreme Court of the State of Arizona is reported in 251 P.2d 908.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This Court has jurisdiction to review the judgment and decision of the State Supreme Court under Title 28 U.S.C.A., Section 1257.

The decision of the Supreme Court of the State of Arizona involves the construction, effect and application of a Federal Act, contrary to the meaning and purpose of that Act, in violation of petitioner's rights under the Fifth Amendment of the Constitution of the United States, and contrary to applicable and controlling decisions of this Court. An order was made by the Supreme Court of the State of Arizona staying the issuance of its mandate to and including April 25, 1953, conditioned upon the filing of this petition in this Court within the time last mentioned, and that said stay shall continue in effect until this petition is passed upon.

SUMMARY STATEMENT OF MATTER INVOLVED

The deceased George A. Romine was a brother of petitioner. Petitioner is the duly appointed, qualified and acting administrator of his deceased brother's estate. The decedent was unmarried, and left no dependents. Petitioner filed an action against the Southern Pacific Company and John R. Curry in the Superior Court of Pima County, Arizona, in Tucson, in two counts.

The first count was against the appellant company alone under the State Employers Liability Act as contained in Sections 56-801 to 56-807 Arizona Code Annotated 1939, in which petitioner alleged George A. Romine was injured and killed by an accident arising out of and in the course of his employment with the appellant company while engaged in the hazardous occupation of railroading as defined by that Act, due to the condition or conditions of such occupation or employment, which said injury and death was not caused by the negligence of George A. Romine, and which accident occurred while decedent was riding on a motor car of the appellant company on its tracks while it was loaded with lumber being transported to another location on said tracks for the purpose of building an addition to a pump house then under construction over a pump used for supplying domestic water to section hands of appellant company living nearby, when a piece of such lumber slipped forward and downward on said motor car, and was thrown back, causing the reverse end of one piece to pierce the body of decedent killing him almost instantly. Negligence under the State statute is not an element of the right to recover.

The second count was against the appellant company and John R. Curry, the foreman of the decedent George A.

Romine, and a resident of the State of Arizona, alleging such foreman and the appellant company negligently operated a motor car on the tracks of the appellant company and as a direct and proximate result of such negligence George A. Romine was injured and killed.

The appellant company, by answer to the first count, admitted the aforesaid employment, injury and death, but denied such injury and death were caused by a condition or conditions of such occupation and employment and were not caused by the negligence of George A. Romine. The appellant company further alleged that at the time of such injury and death both the decedent and itself were engaged in interstate commerce and that part of decedent's duties were in furtherance of interstate commerce, and that decedent was within the coverage of the Federal Employers Liability Act of the United States (Section 51, Title 45, United States Code Annotated), and that decedent upon his death did not leave any surviving widow, children, parent or next of kin dependent upon him. A general denial was made to the charge of negligence in the answer filed by both defendants to the second count.

The jury returned a verdict in the amount of $20,000.00 for petitioner against the appellant company on the first count, and against the petitioner on the second count. Judgment was duly entered in accordance with the verdict by the trial court, and the appellant appealed to the Supreme Court of the State of Arizona, which reversed said judgment outright.

Under the Arizona Liability Act (Sections 56-801 to 56-807 A.C.A., 1939) any employer in hazardous occupations, specifically including railroads, shall be liable for death or

injury of an employee caused by accident due to a condition or conditions of such occupation in all cases where injury or death was not caused by the negligence of the employee so killed or injured. It is not a negligence statute, so far as the employer is concerned, but rather a special compensation act applicable only to hazardous occupations as therein defined. Under it recovery may be had for the injury and death of an employee without dependents by the personal representative for the benefit of the estate of the deceasd employee.

The Federal Employers Liability Act (Title 45, Sections 1 to 60 U.S.C.A.) differs from the State act in two respects material to this case. In the first place, it is wholly a negligence act and the employer is not liable, except for injuries caused by the negligence of the employer, its agents, servants or employees, which was not the case in this action, according to the verdict of the jury in the trial court. In the second place, it is wholly a dependency act and no recovery may be had under it for the injury and death of an employee who has no dependents as in this case. Prior to the trial the appellant company filed a motion for a summary judgment which, after hearing, was denied by the trial court.

The evidence showed that George A. Romine, petitioner's decedent, was injured and killed July 24, 1950, as set out in the complaint. Other members of the gang included the foreman Curry and the witnesses Hesselbaum and Walker. All during the month of July, 1950, prior to the accident, this gang had been engaged in the construction of a pump shed over a pump near Saddle, Arizona. The pump was used for supplying domestic water to the appellant company's maintenance-of-way employees. An older shed near Hyder, Ari-

zona, was wrecked and the material transported, in part at least, by motor car to Saddle. It was on one of these trips with the motor car loaded with such material that petitioner's decedent was injured and killed.

For several months prior to the time this particular project was undertaken, petitioner's decedent had been engaged as a carpenter in general building maintenance upon and along the Southern Pacific line, including the maintenance and repair of the railroad bridges on the section of the appellant company's transcontinental tracks running through Hyder and Saddle, Arizona, west to California, and east to New Mexico. Over that line appellant company's transcontinental freight and passenger trains pass frequently. The witnesses Walker and Hesselbaum testified that, as they moved along in the motor car over these tracks, it was the duty of George A. Romine to make a rolling inspection of the right-of-way and of passing trains thereon. However, the foreman Curry testified that on the day of the fatal trip he instructed the men to watch the material on the motor car and took upon himself the duty of watching the right-of-way. A special notice was signed by the Division Superintendent July 5, 1950, directing all employees to watch and patrol tracks for flood damage but there is no evidence this was brought to the attention of George A. Romine or any member of his gang, except the foreman Curry. Under the evidence there is nothing specific in the rule book of the appellant company that says carpenters should watch passing trains.

The carpenters acted under the instructions of their foremen, and there is no evidence Romine's foreman Curry ever gave him any instructions with reference to making a rolling

inspection. The witnesses Hesselbaum and Walker and other members of the gang testified it was their duty to make such rolling inspections, but they could never recall ever having reported anything as the result of such rolling inspection except during the latter part of 1949 or the early part of 1950 they discovered a loose pipe in the cargo of a gondola car which was reported to the Agent at Willcox.

The collective bargaining contract of the appellant company obligating it to furnish domestic water to members of its maintenance-of-way crews was offered in evidence, but there is no evidence to show that the shed petitioner's decedent was engaged in constructing at the time of his injury and death was necessary to the proper functioning and operation of that pump.

At the close of the plaintiff's evidence, the appellant company offered a motion for a directed verdict which was over-ruled. Such a motion was again offered at the close of all the evidence in the case, and again over-ruled. At the close of plaintiff's case, the appellant company asked and was granted leave to amend its Answer setting up a plea of contributory negligence and assumption of risk to diminish damages. At the request of the appellant company, the trial court instructed the jury in accordance with this amendment with reference to the first cause of action. Thereafter the appellant company made a motion for judgment, notwithstanding the verdict, and for a new trial and on denial of these motions filed an appeal to the Supreme Court of the State of Arizona.

In the Supreme Court of the State of Arizona, the appellant company made two assignments of error. One that the trial court erred in denying the appellant company's mo-

tions for a directed verdict at the close of the plaintiff's case and at the close of all of the evidence, because the evidence showed conclusively that a part of petitioner's decedent's duties were in the furtherance of interstate commerce or in a way directly or closely and substantially affected such commerce, and because the decedent left no dependents no right of action existed under the Federal Act. Assignment two was based upon the trial court's over-ruling its motion for judgment notwithstanding verdict for the same reasons.

The Supreme Court of the State of Arizona took the position that the Federal Employers Liability Act covers the entire field of employers responsibility for injury or death of an interstate carrier's employee, following the doctrine enunciated in the majority opinion in the case of *New York Central Railroad Company v. Winfield*, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045 Ann. Cases 1917D, 1139, and held that the Federal Employers Liability Act is exclusive even in non-negligence and in non-dependency cases. Said Court considered the employee's general duties in interstate commerce several months immediately preceding the fatal accident in determining the question of whether or not the employee was engaged in interstate commerce or in activities affecting or furthering interstate commerce and it held that the 1939 amendment to the Federal Employers Liability Act was applicable to the case at bar, notwithstanding that it is admitted on both sides that there are no benefits which can be paid to petitioner under the Federal Employers Liability Act.

It also held that the testimony that petitioner's decedent was under a continuing duty to make a rolling inspection of the right-of-way and of passing trains thereon, together with the appellant company's collective bargaining contract,

under which it was obligated to furnish domestic water to its maintenance-of-way employees stationed near Saddle, Arizona, and his general duties in interstate commerce months before his injury and death brought this case within the scope of the Federal Employers Liability Act, as amended, to the exclusion of petitioner's rights under the State Employers Liability Act, because such facts were sufficient to bring not only the appellant company, but petitioner's decedent within the field of interstate commerce as defined by the Federal Employer's Liability Act, as amended, and in effect holds that the trial court should have sustained the appellant company's motions for a directed verdict as a matter of law. It reversed and remanded the trial court's judgment with directions to dismiss plaintiff's complaint.

QUESTIONS PRESENTED

The issues presented are whether the Supreme Court of the State of Arizona correctly interpreted the Employers Liability Act of the State of Arizona and the Federal Employers Liability Act in holding that Congress had absorbed the field so as to supersede the State Act and preclude recovery under the State Act in a non-dependency and non-negligence case, not covered by the Federal Act, and whether or not the Federal Employers Liability Act as amended and as construed and applied by the Supreme Court of the State of Arizona to the peculiar fact situation of this non-negligence and non-dependency case to the exclusion of petitioner's rights under the State Act, not included in the Federal Act, constitute a deprivation of due process of law in violation of petitioner's rights under the

Fifth Amendment of the Constitution of the United States; and whether the Supreme Court of the State of Arizona correctly applied the 1939 amendment of the Federal Employers Liability Act to this case, in which there are admittedly no benefits under the Federal Employers Liability Act.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Petitioner takes the position that the Supreme Court of the State of Arizona has decided important questions relating to the construction and application of the Federal Employers Liability Act, as amended (Title 45, Sections 1 to 60 U.S.C.A.) contrary to the intention of Congress and completely beyond the scope of that Act and contrary to controlling decisions of this Court, so as to exclude petitioner's rights under the State Employers Act of Arizona, which rights are not covered by the Federal Act, in violation of petitioner's rights under the Constitution of the United States in this to-wit:

I.

The Federal Employers Liability Act being purely a negligence and dependency act does not preclude petitioner's rights and benefits under the State Employers Liability Act in this non-negligence and non-dependency case.

II.

The construction, interpretation and application of the Federal Employers' Liability Act by the Supreme Court of the State of Arizona that it does preclude petitioner from obtaining the benefits of the State Act in such a case, gives that Act an effect constituting a deprivation of due process

of law in violation of petitioner's rights under the Fifth Amendment of the Constitution of the United States.

III.

The 1939 Amendment to the Federal Employers' Liability Act under its own wording and under the controlling decision of this Court does not affect the rights or remedies of railroad employees under State acts, but merely defines the scope of the word "employee" to include persons not theretofore covered who are engaged in interstate commerce as therein defined *and entitled to the benefits of the Federal Act.* In this case where there are no benefits provided in the Federal Act, the 1939 amendment has no application, and the interpretation and construction of the 1939 amendment by the Supreme Court of the State of Arizona so as to preclude petitioner's rights under the State Act is prejudicial to petitioner, outside the scope and purpose of the 1939 amendment and contrary to the controlling decision of this Court in the case of *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205.

WHEREFORE petitioner respectfully prays for a writ of certiorari to be issued to the Supreme Court of the State of Arizona commanding that Court to certify and send to this Court, for its review and determination, the full and complete transcript of the record and all proceedings entitled as in the caption of this petition and catalogued in the Supreme Court of the State of Arizona as Number 5569, and that the decision and judgment of the Supreme Court of the State of Arizona be reversed by this honorable Court, and the judgment of the trial court reinstated, and for such

other and further relief in the premises as to this Court may seem just.

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CERTIFICATE OF COUNSEL

I, the undersigned counsel for petitioner herein, do hereby certify that the foregoing petition for writ of certiorari in my opinion is well founded and meritorious and is not interposed or filed for the purpose of delay.

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Brief in Support of Petition for Writ of Certiorari

See Reasons for Allowing Writ in Petition:

ARGUMENT

I. & II.

The Federal Employers Liability Act is exclusive of State legislation only in the matters with which it deals (Roberts Federal Liability of Carriers, 2nd Edition, Vol. 2, page 1529). More than thirty-five years ago, and when state compensation acts were in their infancy and struggling for judicial acceptance, this Court, in a split decision, held, in the cases of *New York Central R. Co. v. Winfield*, 244 U.S.

147, 37 S.Ct. 1917D, 1139, 546, 61 L.Ed. 1045 Ann. Cases state compensation acts authorizing recovery for non-negligent claims were superseded by the Federal Employers' Liability Act, even though it is purely a negligence act, under which there is no liability unless the carrier was negligent and the employee was injured thereby. At that time the restrictive nature of the Federal Act was pointed out in a dissenting opinion by Justice Brandeis, concurred in by Justice Clarke, which concludes as follows at page 449 of L.R.A. 1918c:

> "The contention that Congress has, by legislating on one branch of the subject relative to Interstate Commerce, preempted the whole field, has been often made in this Court; and the cases cited below will show has been repeatedly rejected in cases where the will of Congress to leave the balance of the field open to State action was far less clear than the circumstances here considered. Tested by those decisions and by the rules which this Court has framed for its guidance, I am of the opinion, as was said in Atlantic Coast Line R. Co. vs. Georgia 234 U.S. 280, 294, 58 L. Ed. 1312, 1319, 34 S. Ct. 829 that, 'the intent to supersede the exercise of the State police power with respect to this subject cannot be inferred from the restricted action which has thus far been taken'. *The field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents.* I find no justification for imputing to Congress the will to deny a large class of persons engaged in a necessarily hazardous occupation, *and otherwise unprovided for,* the protection afforded by beneficent statutes enacted in the long deferred performance of an insistent duty *and in a field peculiarly appropriate for State action.*" (Emphasis ours.)

Petitioners respectfully urge that this Court re-examine the Winfield case, including the dissenting opinion. Petitioners respectfully assert that an erroneous application of the Federal Employers Liability Act began then and has been carried on to and including the decision of the Arizona Supreme Court in this case. This case is a striking example of challenges presented by dissenting Justices persisting and remaining unanswered. Under such circumstances this Court has said it will re-examine the former decision (*West Coast Hotel Company v. Parrish,* 57 S.Ct. 578, 300 U.S. 379, 81 L.Ed. 703, 108 A.L.R. 1330).

A former decision of this Court does not preclude a review in the light of later actual experience (*Abie State Bank v. Weaver,* 282 U.S. 765, 51 S.Ct. 252, 75 L.Ed. 690), nor is a former opinion any bar to the power of this Court to probe issues disposed of in prior cases (*Urie v. Thompson,* 69 S.Ct. 1018, 337 U.S. 163, 93 L.Ed. 1282). Where time and circumstances have drained the prior case of much of its vitality, this Court will determine the same issue in its present-day setting (*Tigner v. State of Texas,* 60 S.Ct. 879, 310 U.S. 141, 84 L.Ed. 1124 rehearing denied, 60 S.Ct. 1092, 310 U.S. 659, 84 L.Ed. 1422).

We can add little to the vigorous reasoning of the challenges presented by Justices Brandeis and Clarke in the *Winfield case,* supra, other than to urge that the peculiar facts of this case bring those challenges sharply into focus and that certiorari should be granted in the interest of justice to the parties and to give this Court an opportunity to re-examine the out-moded doctrine of the *Winfield case* to the effect that by the entry of Congress into a field with only a negligence statute, State acts providing compen-

sation for injured employees in non-negligence cases are superseded. Non-negligence claims are an entirely different type of claim, and fill a need not provided for in the old negligence actions, as is shown by the continued public demand for, and the acceptance by the courts of, compensation acts during the thirty-five years that have elapsed since this doctrine was enunciated by the majority opinion in the *Winfield case.* Not only is the case at bar a non-negligence case, but it is even outside the scope of the majority opinion in the *Winfield case,* because no recovery could have been had in this case under the Federal Employers Liability Act even if negligence had been proved *because the decedent left no dependents.* That fact is conceded on both sides.

Is there any reason why Congress should have intended to provide redress for the estate of one railroad employee under the Federal Employers Liability Act and deny redress for another's under an adequate State act where both were killed in the same accident and under exactly the same conditions, simply because the first employee had dependents and the latter had none. If such were the intention of Congress, it would have said so explicitly and given the reason therefor. The true rule, we submit, is as stated as follows in appellee's brief (l.c. 574 of 87 L.Ed.) and followed by this Court in *Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen,* 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571:

> "State action, if within the police power, is valid unless Congress has *affirmatively* excluded its exercise by acting directly and immediately upon the subject matter in question, *so that State action is repugnant to Federal action.* Such power is not excluded merely because Congress has regulated a part of the field. Missouri P. R. Co. v. Norwood, 283 U.S. 249, 75 L.Ed.

1010, 51 S.Ct. 458, 30 N.C.A. 639; Kelly v. Washington, 302 U.S. 1, 82 L.Ed. 3, 58 S.Ct. 87; Northwestern Bell Telph. Co. v. Nebraska State R. Commission, 297 U.S. 471, 80 L.Ed. 810, 56 S.Ct. 536; H. P. Welch Co. v. New Hampshire, 306 U.S. 79, 83 L.Ed. 500, 59 S.Ct. 438."

We urge that it is not repugnant to the Federal action to permit the minimum requirements of a State Act to stand in cases where the Federal Act does not even purport to cover as broad a field as the State Act in two such vital aspects as non-negligence and non-dependency claims, for which no provision whatever is made or even suggested in the Federal Act.

The holding of the Supreme Court of the State of Arizona in this case is adverse to the recent decision of this Court in the case of *Davis v. Department of Labor,* 317 U.S. 249, 63 S.Ct., 225, 87 L.Ed. 246 to the effect that there is a presumption that all employees are covered by the compensation provided in the State acts in the absence of convincing reasons rebutting such coverage. The decision of the Ariz. Sup. Ct. is erroneous in the face of the undisputed evidence that the decedent for weeks before his injury and death had been engaged in the construction of an intrastate shed, which was then inchoate and had not been completed to the point where it was ready to be used even indirectly in Interstate Commerce, or in a manner so as to further or affect Interstate Commerce to even an unsubstantial degree, (*New York Central R. Co. v. White,* 249 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667) and further in face of the fact that the very title of the Federal Employers Liability Act itself states it shall only apply in "certain cases" which do not include non-negligence and non-dependency cases.

We submit the majority opinion in the *Winfield case* amounts to an amendment of a legislative act by judicial decision in denial of petitioner's rights under the State act. While we have no case in point, we urge that under the particular fact situation of this case there is presented to this Court, perhaps for the first time, a clear cut example of how the majority opinion in the *Winfield case* amounts to a deprivation of due process of law, in violation of petitioner's rights under the Fifth Amendment to the Constitution of the United States, and further presents an instance where, we submit, this Court can and should grant certiorari to reexamine that thirty-five year old decision in the present-day setting of this case in which State compensation acts for non-negligence claims have, by experience in the interim, found public and judicial acceptance and approval.

It may well be that in 1908 the concept of the "field" of employer responsibility did not, in the opinion of the majority of the Court, extend very far, if at all, beyond the traditional standard of liability of employer to employee for negligence. Those in the practice, who are old enough to recall, remember the cry that "liability without fault" was pure Socialism. It was only because of the efforts of such forward thinking men as Judge Brandeis that the proposal that industry should bear the burden of employment injuries took hold.

Even if Congress, in the enactment of the Federal Employers' Liability Law, had in mind the few compensation and liability statutes then in the States and intended that the Act should preclude their operation, it must be conceded that the Congress of that period had not come to that acceptance of compensation and liability laws which has been

recognized in the past decade. We are dealing with the situation as it exists today, and the power of the States is not to be tested by conceptions prevailing nearly a half century ago.

If this statute were new on our books, it isn't likely that it would be seriously contended that Congress had occupied the entire "field." Not only are compensation and liability states, such as the one we have here, to be found throughout the United States, but the concept has expanded and now includes occupational disability. That too is to be denied to the States if the *Winfield decision* is still to be followed on the theory that the "field" of employer responsibility has been fully occupied. Suppose a railroad employee, with a wife and a half-dozen or more children, should be killed in the course of his interstate employment—unless he were able to prove negligence under the Federal Employers' Liability Act, his widow and children, under the doctrine of the *Winfield case,* would have no remedy under either the State or the Federal act.

There is need for a re-examination of this question in the light of present-day views. The power of the States to provide that railroads shall make financial provision for injuries or death to their employees while in interstate commerce and thus shift that burden from the state taxpayers to the place where it belongs, ought not to be shackled by the conception of a Federal statute which has become wholly unrealistic under modern conditions.

The 1939 Amendment, herewith set out in Point III, has enormously enlarged the class of employees entitled to the "benefits" of the Federal Employers' Liability Act. We believe it fair to estimate that scores of thousands formerly

entitled to the benefits of State non-negligent acts now find themselves unprotected against the hazard of industrial injury, unless they, or their estates or dependents, are able to establish carrier negligence—that is of course if the rule of the majority in the *Winfield case* is to continue to control. This very case gives point to the discussion.

It is no answer, we submit, to say that Congress must be presumed to have intended to legislate in the light of the *Winfield case* and to except the additional beneficiaries from the relief theretofore afforded them by State acts in non-negligent cases. This would indeed be using a principle of statutory construction with a vengeance. In no period in our history has the Congress sought more energetically (whether always wisely) to improve the lot of the workingman. Certainly Congress intended to enlarge the class of those who could seek the relief of the Federal Employers' Liability Act, and more clearly identify the members of the entire class, but there is nothing in its action to justify the view that it intended, by indirection and inference, that the doctrine of the *Winfield case* should be applied either to the old limited class or the new expanded class.

Let the *Winfield rule* be applied and the 1939 Act is an affliction to the employees and a boon to the railroads. Was that the Congressional intention?

Congress has not spoken directly. It is only by inference that the sovereignty of the States has been limited. Inferences depend upon conditions which change with the times. An inference, justified under one state of facts and in one era, may meet repudiation in a different decade, under changed conditions.

The phrase "the entire field has been occupied by the Federal Employers' Liability Act" has become encysted in the law without serious recent analysis, and calls to mind Justice Holmes' frequently quoted statement in *Hyde v. U.S.*, 225 U.S. 347, 391 "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter, for a long time, cease to provoke further analysis."

The Supreme Court of the State of Arizona may have been bound by the *Winfield* majority opinion as to this non-negligence case, but this Court is not, and petitioner respectfully maintains the time has now come for a re-examination of the majority opinion in the *Winfield case,* to meet the challenges so forcefully and clearly made against it by the dissenting Justices at the very time it was written, and in the light of the favorable experience that has been had by both employer and employee, under State compensation acts in the thirty-five years since that opinion was written.

III.

The 1939 Amendment to the Federal Employers' Liability Act has no application in a case where there are no benefits provided under the Federal Act. This amendment is in one sentence and we quote it here, with italics, to show its limited application and purpose, as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be in the furtherance of interstate or foreign commerce; or shall, in any way, directly or closely and substantially affect such commerce, as above set forth, shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce *and shall be considered as entitled to the benefits of this chapter.*"

In this case it is admitted there are no benefits provided under the Federal Employers' Liability Act. Had the 1939 amendment read that the employee be engaged in "such commerce" *or* entitled to the benefits of the Federal Act, then it might be applied without any benefits provided in the Federal Act, but the amendment being in the conjunctive it can only apply, by its own words, where two essential elements are present:

(1) When the employee was engaged in "such commerce," *and* (not "or")

(2) When the employee is entitled to the benefits provided in the Federal Act.

Since only one of these two essential elements is present in this case, the 1939 amendment can have no application.

Except for the 1939 amendment, to come within the scope of the Federal Employers' Liability Act, the employee at the time of his injury or death must have been engaged in actual interstate transportation or work so closely related to interstate transportation as to be practically a part of it. It is not sufficient that any part of an employee's duties furthered or affected interstate commerce. (*Shanks v. Del. & Lack. & West. R. Co.*, 239 U.S. 556, 558, 36 S.Ct. 188, 189, 60 L.Ed. 436 L.R.A. 1916c 797.) Indeed, the appellant company, in another case, admitted that one of its own employees, injured while repairing a boom car used to remove obstacles and obstructions on its interstate railroad tracks, would have been covered by the State compensation act and would not have been within the scope of the Federal Employers' Liability Act, except for the 1939 amendment. (*Southern Pacific Co. v. Industrial Comm.*, 113 P.2d 763 (Cal.App.))

Therefore, even if decedent was under a duty to make the rolling inspection of the tracks and passing trains thereon, except for the 1939 amendment, the Federal Act, as a matter of law, could have had no application to the facts of this case, and the decision of the Supreme Court of the State of Arizona in applying the 1939 amendment to case where it is admitted there are no benefits under the Federal Act, despite the conjunctive wording of the 1939 amendment requiring benefits as well as that the employee be engaged in "such commerce," is highly prejudicial to petitioner. In this connection, we urge that this Court examine the case of *Montgomery v. Terminal R. Assoc.*, 73 S.W. 236 (Mo. Sup.) cert. den. 233 U.S. 602, 53 S.Ct. 118 holding, under an almost identical fact situation, that the duty of a railroad carpenter to make a rolling inspection of the right-of-way and passing trains thereon, while traveling in a motor car to an intrastate construction project was not sufficient, as a matter of law, to bring such employee within the scope of the Federal Employers' Liability Act before the 1939 amendment. A long list of authorities on the point are collected in that case and we know of no authority to the contrary.

We do not believe even the appellant company will contend the Federal Act has any application under the facts of this case, except for the 1939 amendment. We submit the 1939 amendment does not apply under its conjunctive wording unless (1) the employee was engaged in "such commerce," *and* (2) entitled to benefits under the Federal Act. Therefore the Supreme Court of the State of Arizona has erroneously applied the 1939 amendment to this non-benefit case under the Federal Act, to the exclusion of petitioner's

rights under the State Act. We submit this erroneous application of the 1939 amendment, to a case which Congress never intended it should be applied under the conjunctive wording of the amendment, should be reason enough for this Court to grant certiorari.

Moreover, the decision of the Supreme Court of the State of Arizona, in applying such inapplicable 1939 amendment to a case where there are no benefits under the Federal Act, so as to preclude petitioner's rights under the State Act, is not only contrary to the conjunctive wording of the 1939 amendment, but is also contrary to the recent decision of this Court in *Desper v. Starved Rock Ferry Company,* 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205, in which this Court said at l.c. 209 of 96 L.Ed.:

> "We agree with the Court below that the amendment *has no effect on the right or remedy of railway employees* but merely defines for the purposes of the Federal Employers' Liability Act, *the scope of the word 'employee'* to include certain persons, not heretofore covered, because they were not directly engaged in interstate or foreign commerce."

The Supreme Court of the State of Arizona has applied the 1939 amendment so as to affect and preclude petitioner's right and remedy under the State Act, while at the same time holding there are no benefits to which petitioner is entitled under the Federal Act, contrary, we submit, to the controlling decision of this Court in *Desper v. Starved Rock Ferry Co.*, supra, holding the 1939 amendment has no effect upon the rights and remedies of railroad employees, but only defines employees entitled to the benefits of the Federal Act, who were not theretofore covered.

CONCLUSION

Petitioner therefore submits that this Court should grant certiorari in this case for the following reasons:

(1) The Federal Employers' Liability Act, being purely a negligence and a dependency Act, does not preclude petitioner's rights and benefits in this non-negligence and non-dependency case under the State Act.

(2) The construction, interpretation and application of the Federal Employers' Liability Act by the Supreme Court of the State of Arizona that it does preclude petitioner from obtaining the benefits of the State Act, in such a case, constitutes a deprivation of the due process of law, in violation of petitioner's rights under the Fifth Amendment of the Constitution of the United States.

(3) The 1939 amendment to the Federal Employers' Liability Act has no application, under its own wording and under the prior controlling decision of this Court, to a case where there are no benefits provided in the Federal Act.

Respectfully submitted,

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(Appendix follows)